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IN THE

Supreme Court of the United States

OCTOBER TERM, 1968

No. 327

WILLIAM J. JACOBS,

Petitioner

v.

THE TOLEDO BAR ASSOCIATION,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF OHIO.

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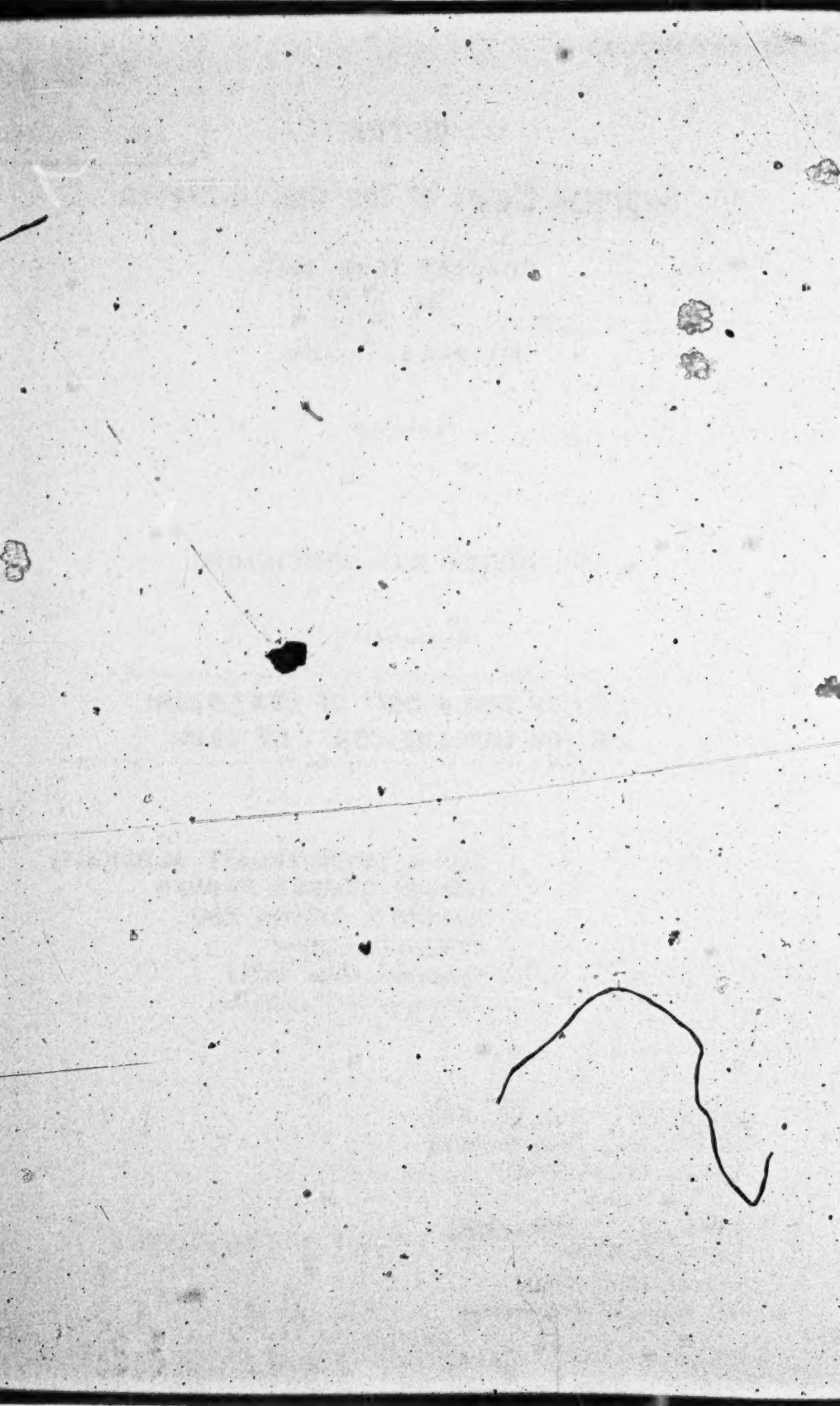

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WILLIAM J. JACOBS,

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v.

THE TOLEDO BAR ASSOCIATION,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF OHIO.

Petitioner herein, William J. Jacobs, prays for a writ of certiorari to review the order of the Supreme Court of Ohio, entered March 20, 1968, which indefinitely suspends petitioner from the practice of law in Ohio.

OPINION BELOW

The opinion of the Supreme Court of Ohio (App. A, *infra*, pp. 11-13) is reported at 13 Ohio St. (2d) 147.

JURISDICTION

The order of the Supreme Court of Ohio was entered on March 20, 1968 (App B, *infra*, pp. 14-15). On April 24, 1968, the Supreme Court of Ohio denied rehearing (App. C, *infra*, p. 16). The jurisdiction of this Court is invoked under 28 U.S.C. 1257 (3), and Rule 19 of this Court, which provides for review on

a writ of certiorari, "where a state court has decided a federal question of substance not theretofore determined by this court, or has decided it in a way probably not in accord with applicable decisions of this court".

QUESTIONS PRESENTED

1. Was petitioner deprived of the right or privilege to practice law without a full and fair hearing as guaranteed by the Fourteenth Amendment of the Constitution of the United States where:
   (a) he has had no opportunity to explain fully to the Board of Commissioners on Grievances and Discipline established by rule of the state court, nor to a court, the circumstances surrounding the issuance of certain checks and bank statements which were submitted by the respondent herein to the Board after the close of the hearing before a panel of such Commissioners;
   (b) he has not had the opportunity to present the testimony of Robert J. Devine, a principal witness against petitioner at the hearing before the panel of Commissioners, who, at that time, was then facing an indictment and a professional disciplinary proceeding, and consequently did not make a full disclosure of the transactions forming the basis for these proceedings, and who is now ready and willing to straighten the record and correct the injustice he has created for his former associate, William J. Jacobs;
   (c) notwithstanding the statement of the state court that it had not considered the erroneous finding of the Board of Commissioners on Grievances and Discipline that the petitioner violated Canon 6 in representing clients with conflicting interests, the finding was known to the court;

(d) the finding of the state court that "it appears that respondent [William J. Jacobs] deposited the receivership funds in the trustee account he used for all his clients", was apparently based on the checks and bank statements submitted by the respondent herein to the Board of Commissioners on Grievances and Discipline after the close of the hearing before the panel of Commissioners.

2. Was the penalty of indefinite suspension from the practice of law imposed by the state court upon the petitioner harsh and unreasonable under the circumstances of this case?

CONSTITUTIONAL PROVISIONS INVOLVED

Section I of the Fourteenth Amendment to the Constitution of the United States reads as follows:

> "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

STATEMENT OF THE CASE

From the time of his admission to the Ohio Bar in 1954 until mid-1966, petitioner was associated with Robert J. Devine in the general practice of law in Toledo, Ohio, under the firm name of Jacobs and Devine. Unfortunately, the practice of law was not very rewarding for Mr. Devine. He experienced numerous financial difficulties. By early 1964 he did not maintain a special or trust account for clients' funds. In fact, he did not have even a personal checking account. Quite likely, Mr. Devine's abhorence of a checking account stemmed from the grievance filed against him by Willard A. Johnson, a

Toledo attorney, over a "bad check", which grievance ultimately led to Mr. Devine's suspension from the practice of law in Ohio.

Early in 1963, Mr. Devine was appointed receiver by the Court of Common Pleas of Lucas County, Ohio, in Case No. 194109. The petitioner and Willard A. Johnson were appointed co-counsel for the receiver. The principal asset of the receivership was the "Mayflower Bar". From the beginning of the receivership until December of 1963, repeated efforts were made to sell the Mayflower Bar, including its liquor license, as a going concern. Various individuals acted as managers of the tavern to keep it operating.

Petitioner secured the sale of the bar and liquor permit for $11,500 and deposited the proceeds of the sale in a savings account in the name of the receiver. Mr. Johnson required the petitioner to retain joint control over the receivership account by means of a power of attorney given to the petitioner.

As a means of "freezing" the account proceeds and removing any temptation from Mr. Devine, petitioner caused the receiver's account to be pledged as collateral security for a bank loan to a cousin-client, Mr. George Mickel, a financially well to do Toledo business man. Petitioner also caused the pledged account to be secured by a cognovit note executed by Mr. Mickel, bearing interest and payable on demand.

The loan was repaid in full, all receivership property was accounted for, the required accountings were filed and the receivership under Case No. 194109 was closed with the approval of the Court of Common Pleas of Lucas County.

The Toledo Bar Association, respondent herein, filed a complaint against peritioner, which complaint was heard on Wednesday, October 12, 1966, by a panel of the Board of Commissioners on Grievances and Discipline established under

Rule XVIII of the Supreme Court of Ohio. One of the principal witnesses against the petitioner at the hearing was Robert J. Devine. At that time, Mr. Devine was facing a potential criminal indictment and a professional disciplinary proceeding. As indicated in the affidavit of Mr. Devine, which was attached to petitioner's motion for a referral to the Board of Commissioners on Grievances and Discipline for rehearing and reconsideration (App. D, *infra*, pp. 22-24), filed with the state court on October 12, 1967, Mr. Devine did not make a full disclosure of the transactions forming the basis of the disciplinary proceedings, and is now ready and willing to straighten the record and correct the injustice he has created for his former associate, petitioner, William J. Jacobs.

As shown by the affidavit of petitioner, which was filed in the state court with his motion for referral to the Board of Commissioners on Grievances and Discipline for rehearing and reconsideration (App. D, *infra*, pp. 20-21) and by the transcript of testimony, after the hearing was closed before the panel of Commissioners on October 12, 1966, bank statements and numerous checks were submitted to the Board of Commissioners by the Toledo Bar Association from petitioner's trust account for the months of December, 1963 through July, 1964. The hearing was not reopened to receive the evidence or to permit the petitioner to explain the relationship of the individual items or the circumstances surrounding the issuance of the individual items. The finding of the state court that "it appears that respondent [William J. Jacobs] deposited the receivership funds in the trustee account he used for all his clients", apparently is based on the checks and bank statements submitted by the respondent to the Board of Commissioners after the close of the hearing before the panel of Commissioners.

The Board of Commissioners on Grievances and Discipline found the petitioner guilty of misconduct in violation of Section 5 (a) of Rule XVIII of the Rules of Practice of the Supreme Court of Ohio by violating his oath of office; Canon 11 (pledging trust funds and commingling trust funds with personal funds), and Canon 32 (failing to conduct himself as an honest man) of the Canons of Professional Ethics. The Board recommended that petitioner be suspended from the practice of law for an indefinite period.

On March 20, 1968, the state court affirmed the recommended order of the Board of Commissioners and indefinitely suspended the petitioner from the practice of law. On April 24, 1968, the state court denied petitioner's motion for a rehearing.

HOW FEDERAL QUESTIONS PRESENTED

The questions here involved were first put in issue on October 12, 1967, when the petitioner moved the state court for an order referring the proceeding back to the Board of Commissioners on Grievances and Discipline for rehearing and reconsideration. The issues were again raised on November 17, 1967, on the petitioner's motion for rehearing on the order of November 8, 1967, overruling his motion to refer the proceeding back to the Board of Commissioners on Grievances and Discipline. The questions involved were again raised on March 29, 1968, when the petitioner requested the state court to grant a rehearing for the purpose of reconsidering its decision of March 20, 1968. On each occasion when such issues were raised by the petitioner, the issues were briefed by the petitioner and by the respondent, The Toledo Bar Association.

REASONS FOR GRANTING THE WRIT

Whether the practice of law is termed a right or a privilege, a disciplinary proceeding must afford due process of law under the Fourteenth Amendment of the Constitution of

the United States. *Spevack v. Klein*, 385 U.S. 511, 87 S. Ct. 625 (1967); *In re Schlesinger*, 404 Pa. 584, 172 A. (2d) 835 (1961). See, 98 L. Ed. 851 for an annotation involving "Suspension or revocation of medical or legal professional license as violating due process – federal case". Also see, *Schware v. Board of Bar Examiners of State of New Mexico*, 353 U.S. 232, 77 S. Ct. 752, 64 A.L.R. (2d) 288 (1957) and *Hackin v. Lockwood*, 361 F (2d) 499 (C.A. 9, 1966).

It is axiomatic that "an opportunity for hearing is one of the essential elements of due process***". 16 Am. Jur. (2d) 972, Constitutional Law, Section 569. The same authority at page 973 makes the following statement:

> "Hence, no one may be legally divested of his property unless he is allowed a hearing before an impartial tribunal, where he may contest the claim set up against him and be allowed to meet it on the law and facts and show if he can that it is unfounded."

Notwithstanding the assertion on several occasions by the petitioner that he would be unable to furnish to the Board of Commissioners a bank statement for June, 1964, after the hearing was closed, bank statements, not only for June, 1964, but for at least an eight month period, much of which had nothing to do with the grievance filed against him, were offered in evidence. Petitioner has had no opportunity to fully explain the circumstances surrounding the issuance of these numerous checks, nor the bank statements. On previous occasions, the respondent has contended that the documents were submitted pursuant to stipulation, and that each party was granted the opportunity to examine them prior to their being filed with the Board of Commissioners, and to comment upon them in their respective briefs. It is submitted that an opportunity to comment upon documents by way of brief is not the same as having an opportunity to verbally explain the circumstances surrounding the issuance of various checks.

This is particularly so where numerous checks are involved, as in the case at bar. There cannot be a full hearing in the constitutional sense if the party has not had an opportunity to test, explain or refute evidence received by the tribunal.

Robert J. Devine, a former associate of the petitioner and a principal witness against the petitioner at the hearing before the panel of three Commissioners, was at that time facing a potential indictment and a professional disciplinary proceeding. As the state court was aware, on October 7, 1967, Mr. Devine, in an affidavit attached to petitioner's motion to refer the case back to the Board of Commissioners on Grievances and Discipline (App. D, *infra*, pp. 22-24), admitted that he did not tell the full story regarding the various financial transactions at the hearing before the panel of Commissioners, and declared that if he were given another opportunity to testify before the Board, he would make a full disclosure as to the complete transaction, and that he would welcome the opportunity to straighten the record once and for all.

When a court has called to its attention, prior to taking final action, facts which show that a principal prosecuting witness had failed to tell the whole truth at an earlier hearing, but because of a change in circumstances, not within the control of the accused, is then willing to tell the full truth, the refusal to reopen the hearing to secure the full truth deprives the person accused of due process.

As the state court concedes in its opinion (App. A, *infra*, p. 13), the respondent's complaint did not charge the petitioner with a violation of Canon 6. The complaint was not amended and no evidence was introduced by respondent for the purpose of proving a violation of Canon 6. Notwithstanding these facts, the Board of Commissioners on Grievances and Discipline expressly found that the petitioner "while acting as one of the Attorneys for Robert J. Devine, the re-

ceiver, was also the Attorney for Patrick Orlando and Shirley Orlando, the persons who had a secured position in the proceeds and the assets received from the sale of the Mayflower Bar, in violation of Canon 6." The Board, in the light of the foregoing findings, concluded that the petitioner has violated Canon 6 by placing himself in the position of representing adverse and conflicting interests and parties, and urged this violation in recommending to the state court that the petitioner be suspended from the practice of law for an indefinite period.

Admittedly, the state court, in its opinion, says that in reaching its decision it has not considered the finding by the Board that the petitioner violated Canon 6. Although there is no question of the bona fides of the state court, it is difficult to believe that the findings and recommendations of the Board did not have any effect on the decision. It is submitted that the situation is very similar to that which exists where a prosecutor comments on a defendant's failure to testify. See, *Griffin v. State of California*, 380 U.S. 609, 85 S. Ct. 1229 (1965), where this Court held that statements by the prosecution or court concerning the failure of the accused to testify on his own behalf deprived him of his constitutional rights. Clearly, if an accused may be prejudiced by such statements, the petitioner was prejudiced by the findings and conclusions stated by the Board of Commissioners on Grievances and Discipline, an arm of the state court, in the case at bar.

This Court *In re Ruffalo*, _____ U.S. _____, 88 S.Ct. 1222 (1968), recently held that absence of fair notice of a charge in a disbarment proceeding deprived the attorney of procedural due process. By the same reasoning, the finding by the Board that petitioner had violated Canon 6, with which he had not been charged, deprived him of procedural due process.

An indefinite suspension from the practice of law is harsh and unreasonable under the circumstances of this case. It is true that Rule XVIII of the Supreme Court of Ohio provides for reinstatement after two years following the entry of an order suspending a lawyer from the practice for an indefinite period. Petitioner is informed and believes, however, that in practice, a suspension for an indefinite period is equivalent to disbarment. To date, no attorney who has been suspended for an indefinite period under the rule of the state court has been reinstated. Clearly, in Ohio, an indefinite suspension is tantamount to disbarment. The petitioner believes that the indefinite suspension ordered in this case will, in effect, be his permanent disbarment. This is truly a harsh and unreasonable penalty to impose on a first offender who has been a member of the bar of Ohio since 1954, when it appears that the petitioner's fault was in the exercise of loyalty and allegiance in trying to help his law associate and fellow lawyer.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be granted.

Respectfully submitted,

LUCAS, PRENDERGAST, ALBRIGHT, GIBSON, BROWN & NEWMAN

By Rankin M. Gibson

Rankin M. Gibson
42 East Gay Street
Columbus, Ohio 43215

Attorneys for Petitioner

APPENDIX A

TOLEDO BAR ASSOCIATION v. JACOBS.

[Cite as Toledo Bar Assn. v. Jacobs, 13 Ohio St. 2d 147.]

Attorneys at law—Misconduct—Pledging trust funds—Commingling trust funds—Failing to conduct himself as honest man—Acts warranting suspension.

(D.D. No. 82 – Decided March 20, 1968)

ON CERTIFIED REPORT by the Board of Commissioners on Grievances and Discipline.

The record supports the following facts found by the Board of Commissioners on Grievances and Discipline. Respondent was attorney for a receivership. The assets of the receivership were a bar and a liquor permit. Respondent procured the sale of the bar and permit for $11,500 and deposited the proceeds of the sale in a savings account in the name of the receiver. Respondent was given a power of attorney to withdraw funds from this receivership account.

Respondent pledged the funds in the receivership account to secure a "pass-book loan" of $10,000 which he then loaned, in the name of the receiver, to his cousin. The cousin repaid the loan to respondent within a few months. On June 9, 1964, the receivership account was closed, and it appears that respondent deposited the receivership funds in the trustee account he used for all his clients.

For one month, from June 9 until July 9, 1964, the receivership funds were not segregated from personal funds of respondent or trust funds of other clients in respondent's trustee account. On 18 days during that period, the trustee ac-

count contained substantially less than $11,500, and the difference cannot be explained in terms of expenditures for the receivership. Respondent also made disbursements from the trustee account for personal expenses unrelated to the business of any particular client.

At the insistence of co-counsel for the receiver, who had learned of the closing of the receivership savings account, respondent deposited $11,500 in a new receivership savings account on July 8, 1964. Later, accountings were filed and the receivership was closed with the approval of the Court of Common Pleas.

The Board of Commissioners on Grievances and Discipline found respondent guilty of misconduct in violation of Section 5(a) of Rule XVIII of the Rules of Practice of the Supreme Court by violating his oath of office, Canon 11 (pledging trust funds and commingling trust funds with personal funds), and Canon 32 (failing to conduct himself as an honest man) of the Canons of Professional Ethics. The board recommended that respondent be suspended from the practice of law for an indefinite period.

Mr. Charles E. Ide, Jr., and Mr. Jamille G. Jamara, for realtor.

Messrs. Cubbon & Rice, Mr. Frank W. Cubbon, Jr., and *Mr. Rankin M. Gibson,* for respondent.

Per Curiam. Respondent contends that his conduct in this case shows very bad judgment but does not amount to professional misconduct. The court is unable to agree with this contention.

Respondent pledged funds held in trust for a client to secure a loan to his cousin. Respondent commingled the client's funds with his own funds and those of other clients. The record supports the inference that respondent took no

greater care of the trust funds of his other clients than he did of the receivership funds in this case. We find that the facts show two clear violations of Canon 11, *i.e.*, the unauthorized pledge and commingling of trust funds and a violation of Canon 32 in that he failed to conduct himself as an honest man.

Respondent challenges the board's authority to find that he violated Canon 6 by representing clients with conflicting interests without a full disclosure of his role to both parties. Relator's complaint did not charge such a violation, the complaint was not amended, and no evidence was introduced by relator for the purpose of proving a violation of Canon 6. In reaching our decision we have not considered the finding by the board that respondent violated Canon 6.

The report and recommendation of the board is hereby confirmed, and the respondent is suspended from the practice of law for an indefinite period.

Report confirmed and judgment accordingly.

TAFT, C.J., ZIMMERMAN, MATTHIAS, O'NEILL, HERBERT, SCHNEIDER and BROWN, JJ., concur.

APPENDIX B

THE STATE OF OHIO, :

:

City of Columbus. :

The Toledo Bar Association, :

Relator, :

:

v. DD No. 82 :

William J. Jacobs, :

Respondent. :

The Supreme Court of the State of Ohio Of the Term of January, 1968 – To-wit: March 20, 1968.

ON CERTIFIED REPORT BY THE BOARD OF COMMISSIONERS ON GRIEVANCES AND DISCIPLINE

It appearing to the Court that the Board of Commissioners on Grievances and Discipline filed its Final Report in this Court on March 29, 1967, recommending that the respondent, William J. Jacobs, should be indefinitely suspended from the practice of law pursuant to Section 6(b) of Rule XVIII of the Supreme Court of Ohio, and it further appearing that Respondent filed objections to the Final Report of the Board of Commissioners on Grievances and Discipline, this cause was argued by counsel. On consideration whereof, it is ordered and adjudged by this Court that the Final Report of the Board of Commissioners on Grievances and Discipline be, and the same hereby is, confirmed and the respondent, William J. Jacobs, is indefinitely suspended from the practice of law.

The respondent, William J. Jacobs, is hereby ordered to cease and desist from the practice of law in any form and is

forbidden to appear on behalf of another before any court, judge, commission, board, administrative agency or other public authority. It is further ordered that he be forbidden to counsel or advise, or prepare legal instruments for others or in any manner perform services of any kind for others which would constitute the practice of law. He is also forbidden to hold himself out to another or to the public as being authorized to perform legal services, and he is hereby divested of each, any and all of the rights, privileges and prerogatives customarily accorded to a member in good standing of the legal profession of Ohio.

It is further ordered that the respondent, William J. Jacobs, surrender his Certificate of Admission to Practice to the Clerk of this Court forthwith and that his name be stricken from the roll of attorneys maintained by this Court.

It is further ordered that the respondent, William J. Jacobs, pay the costs of these proceedings taxed in the amount of Seven Hundred Four dollars and sixty-eight cents ($704.68).

It is further ordered that the Clerk of this Court issue certified copies of this entry as provided for in Section 19, Rule XVIII of the Rules of Practice of this Court.

APPROVED: /S/ KINGSLEY TAFT, CHIEF JUSTICE

I, Thomas L. Startzman, Clerk of the Supreme Court of the State of Ohio, do hereby certify that the foregoing entry was correctly copied from the records of said Court, to wit, from Journal No. 48.

IN WITNESS WHEREOF, I have hereunto subscribed my name and affixed the seal of said Supreme Court, this 20th day of March, 1968.

Seal Affixed

/S/ THOMAS L. STARTZMAN, CLERK
/S/ SAM F. ADKINS, DEPUTY

APPENDIX C

THE SUPREME COURT OF THE STATE OF OHIO

THE STATE OF OHIO,
City of Columbus.

1968 TERM

To wit: April 24, 1968

The Toledo Bar Association,
Relator,

vs.

William J. Jacobs,
Respondent.

No. DD#82
REHEARING

It is ordered by the court that rehearing in this case is denied.

I, THOMAS L. STARTZMAN, Clerk of the Supreme Court of the State of Ohio, do hereby certify that the foregoing entry was correctly copied from the records of said Court, to wit, from Journal No. Page

IN WITNESS WHEREOF, I have hereunto subscribed my name and affixed the seal of the Supreme Court this 24th day of April, 1968.

Seal Affixed

/S/ THOMAS L. STARTZMAN, CLERK
/S/ SAM F. ADKINS, DEPUTY

APPENDIX D

IN THE SUPREME COURT OF OHIO

The Toledo Bar Association	:	
Relator,	:	
v.	:	No. DD-82
William J. Jacobs	:	
Respondent.	:	

RESPONDENT'S MOTION FOR REFERRAL TO BOARD OF COMMISSIONERS ON GRIEVANCES AND DISCIPLINE FOR REHEARING AND RECONSIDERATION

Comes now William J. Jacobs, respondent herein, and moves the Court for an order referring this proceeding back to the Board of Commissioners on Grievances and Discipline for rehearing and reconsideration for the following reasons:

1. That Robert J. Devine, a principal witness against respondent in the hearing before the panel of three commissioners, who at the time of such hearing was then facing an indictment and a professional disciplinary proceeding, and consequently, did not make a full disclosure of the transactions forming the basis for these proceedings, is now ready and willing to straighten the record and correct the injustice he has created for his former associate, William J. Jacobs.

2. That several material findings of fact made by the Board of Commissioners were based on documentary evidence, *viz.*, bank statements and numerous checks submitted to the Board by the relator after the close of the hearing, and hence, the respondent has been deprived of a full and fair hearing since he has had no opportunity to explain fully the circumstances surrounding the issuance of such checks and statements.

Cubbon and Rice
300 Security Building
Toledo, Ohio

and

/S/ Lucas, Prendergast, Albright & Warren

Seal Affixed

By Rankin M. Gibson
42 East Gay Street
Columbus, Ohio
Attorneys for Respondent

MEMORANDUM IN SUPPORT OF MOTION

As this Court is well aware, admission to the practice of law in this state and all matters relating to discipline and reinstatement of attorneys are inherently judicial in nature and are exclusively under the control of this Court. *In re McBride*, 164 Ohio St. 419, 132 N.E. (2d) 111 (1956); *In re Nevius*, 174 Ohio St. 560, 191 N.E. (2d) 166 (1963); *Judd v. City Trust & Savings Bank*, 133 Ohio St. 81, 12 N.E. (2d) 288 (1937; *Land Title Abstract & Trust Co. v. Dworken*, 129 Ohio St. 23, 193 N.E. 650 (1934). In the exercise of its inherent power, this Court promulgated Rule XXVII, effective January 1, 1957, to govern the discipline and reinstatement procedure. Effective March 11, 1964, the rule was amended to become Rule XVIII.

In disciplinary cases the Board of Commissioners on Grievances and Discipline acts for and on behalf of this Court. In doing so, it makes recommendations as to the facts which should be taken into consideration by this Court. However, the responsibility for the facts determined and the disciplinary action taken rests entirely in this Court. *Mahoning County Bar Association v. Ruffalo*, 176 Ohio St. 263, 199 N.E. (2d) 396 (1964).

Without question, this Court, having the power to create a Board of Commissioners on Grievances and Discipline for the purpose of holding hearings to determine facts and recommend appropriate forms of discipline, has the power to refer such matters back to the Board for rehearing and reconsider-

ation in a proper case. It is submitted that where new and additional evidence is available and it should be considered, that this Court may and should refer the proceeding back to the Board for rehearing and reconsideration.

The attached affidavit (Exhibit A) of the respondent relative to the bank statement and checks adduced by the relator after the hearing before the Board of Commissioners was closed, and the affidavit (Exhibit B) of Robert J. Devine, the principal witness against the respondent, vividly demonstrate that an injustice will be done in this cause unless the full story is known to the Court.

In the interest of justice and a full and fair hearing, it is strongly urged that this Court, not being equipped or staffed to consider evidentiary matters and having created the Board of Commissioners on Grievances and Discipline for such purpose, should refer this proceeding back to the Board for rehearing and reconsideration.

Respectfully submitted,
Cubbon and Rice
300 Security Building
Toledo, Ohio
and
/S/ Lucas, Prendergast, Albright & Warren
By Rankin M. Gibson
42 East Gay Street
Columbus, Ohio
Attorneys for Respondent

CERTIFICATE OF SERVICE

A copy of the foregoing motion and memorandum in support thereof was mailed this 12th day of October, 1967, to Charles E. Ide, Jr., Esq., 1010 National Bank Building, Toledo, Ohio, and to Jamille G. Jamra, Esq., 240 Huron Street, Toledo, Ohio, Attorneys for Relator.

/S/ RANKIN M. GIBSON

IN THE SUPREME COURT OF OHIO

The Toledo Bar Association :
Relator :
v. : No. DD-82
William J. Jacobs : *AFFIDAVIT*
Respondent :

STATE OF OHIO
COUNTY OF LUCAS, ss:

WILLIAM J. JACOBS, respondent herein, being first duly sworn according to law, deposes and says that he was prejudiced by evidence submitted to the Board of Commissioners of Grievances and Discipline by The Toledo Bar Association after the hearing was closed; that such evidence consisted of checks on respondent's Trustee Account for the months of December, 1963, through July, 1964; that such evidence was offered after the hearing before the Commissioners and when relator knew that a bank statement for June, 1964, could not possibly be obtained because the Bank had failed to photostat the records for that month.

Affiant further says that the findings by the Board of Commissioners that a loan was made of the Receiver's funds in the amount of Ten Thousand and No/100 Dollars ($10,000.00), that Six hundred and No/100 Dollars ($600.00) was paid as rent, and Eight Hundred and No/100 Dollars ($800.00) as a real estate commission, were based upon the evidence submitted by relator after the close of the hearing.

Affiant further says that on several occasions he stated to the Board of Commissioners that the bank statement for June, 1964, which is the all important statement, could not be delivered in evidence; and that after the hearing was closed, bank statements, not only for June, 1964; but for at least an eight month period, much of which had nothing to do with the grievance filed against affiant, were offered in evidence; that

affiant had no opportunity to explain the circumstances surrounding the numerous checks; and thereby has been deprived of a fair and full hearing.

Affiant respectfully requests the Court to consider the grave consequence of this prejudicial procedure and requests the Court to refer the matter back to the Board of Commissioners on Grievances and Discipline for rehearing, thereby giving affiant an opportunity to explain each check item offered in evidence in the matter herein.

Further, affiant sayeth not.

/S/ William J. Jacobs

Sworn to before me and subscribed in my presence this 3rd day of October, 1967.

/S/ Victor A. Rosenberger, Jr.
Notary Public, State of Ohio
My Commission has no expiration date,
Sec. 147.03 R.C.

Seal
Affixed

IN THE SUPREME COURT OF OHIO

The Toledo Bar Association	:	
Relator	:	
v.	:	No. DD-82
William J. Jacobs	:	*AFFIDAVIT*
Respondent	:	

STATE OF OHIO
COUNTY OF LUCAS, ss:

ROBERT J. DEVINE, being first duly sworn according to law, deposes and says that he was engaged in the practice of law in association with William Jacobs, respondent herein, until July 1, 1966, and that this statement is made respecting transactions concerning William Jacobs in the matter now pending before the Supreme Court of Ohio.

Affiant says that on July 26, 1962, the said William Jacobs obtained for affiant a loan in the amount of Twenty-two thousand and No/100 Dollars ($22,000.00) from his uncle, Danny Thomas; that to secure this loan, affiant delivered to the said Danny Thomas a second mortgage on several parcels of real estate that affiant was purchasing at the time; that from the date of the loan through December of 1964, because of financial distress, affiant was unable to keep the first mortgage paid and also could not make payments on the second mortgage (all of which can be verified by a publication in the Legal News in this area under date of December, 1964, at which time the property in question was foreclosed upon).

Affiant makes these statements to illustrate and prove his financial distress at the time the respondent, William J. Jacobs, set up the Receivership Account at Toledo Home Federal Savings and Loan Association; at the time affiant

knew the Account was pledged to George A. Mickel, who was financially secure, to keep the money from being accessible to affiant. Affiant knows this is in contrast to his testimony given before the Board of Commissioners on Grievances and Discipline on the 12th day of October, 1966.

Affiant further states that he was aware of the complete transaction relative to Receivership, the loan to George A. Mickle, and other matters surrounding the endorsement by affiant of the check to Mr. Mickel in the amount of Ten Thousand Dollars ($10,000.00).

Affiant further states that again this is contrary to his testimony before the Board of Commissioners on Grievances and Discipline of the Supreme Court of Ohio on Wednesday, the 12th day of October, 1966.

Affiant further states that it is true that at the time of this transaction, the respondent, William J. Jacobs, knew of affiant's financial difficulties, and that affiant was looking for money wherever affiant could find it.

Affiant further states that he did not tell the full story concerning these matters; that if given another opportunity to testify before the Board of Commissioners on Grievances and Discipline of the Supreme Court of Ohio, affiant will make a full disclosure as to the complete transaction.

Affiant says that his reason for testifying in the first instance as he did was for the purpose of self-preservation, that affiant's testimony at that time was given with concern for the consequences affiant was facing at that time because of possible indictment that later became a reality and the suspension from his profession that later became a reality; that at the time of the hearing on the complaint against the respondent, affiant was still hopeful that by not compounding his own transgressions that criminal action and disciplinary action by this Court could be avoided.

Affiant further states that the contradictory statements affiant has attempted to correct herein are illustrative only, and that he would welcome the opportunity to straighten the record once and for all and correct the injustice that he has created against his former associate, William J. Jacobs.

Further, affiant sayeth not.

/S/ Robert J. Devine

Sworn to before me and subscribed in my presence this 6th day of October, 1967.

/S/ Victor A. Rosenberger, Jr.

Seal Affixed

Notary Public, State of Ohio
My Commission has no expiration date,
Sec. 147.03 R.C.

CERTIFICATE OF SERVICE

I certify that a copy of the foregoing Petition for Writ of Certiorari was mailed with first class postage prepaid to Charles E. Ide, Jr., Esq., 1010 National Bank Building, Toledo, Ohio, and to Jamille G. Jamara, Esq., 240 Huron Street, Toledo, Ohio on the 16TH day of July, 1968.

Rankin M. Gibson

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JOHN F. DAVIS, CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1968.

No. 327.

WILLIAM J. JACOBS,

Petitioner,

v.

THE TOLEDO BAR ASSOCIATION,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE SUPREME COURT OF OHIO.

BRIEF OF RESPONDENT IN OPPOSITION.

CHARLES E. IDE, JR., ESQ.,
1010 National Bank Building,
Toledo, Ohio 43604,
and
JAMILLE G. JAMRA, ESQ.,
240 Huron Street,
Toledo, Ohio 43604,
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ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF OHIO.

BRIEF OF RESPONDENT IN OPPOSITION.

Respondent The Toledo Bar Association opposes the petition filed herein for a writ of certiorari and prays that such petition be denied.

QUESTIONS PRESENTED.

The questions presented for review, as stated by petitioner, are not accurately "expressed in the terms and circumstances of the case" (see paragraph 1 (c) of Rule 23). The inaccuracies are noted *infra* in respondent's statement of the case.

STATEMENT OF THE CASE.

Respondent sets forth here certain facts material to the consideration of the petition for writ of certiorari which were not included in petitioner's statement or which were inaccurately presented therein.

In the answer signed by petitioner and filed in response to the complaint filed by respondent with the Board

of Commissioners on Grievances and Discipline, petitioner admitted that he received the sum of $11,500.00 in trust while he was acting as attorney for the receiver, and "that he deposited said sum in a savings account number 6249 of Toledo Home Federal Savings Association and permitted said account to be used as collateral security for a passbook loan for another client, but subject to immediate recall and payment." (A. p. 8, *infra.*) Petitioner also freely admitted such use of the receivership funds in his oral testimony before the Board.

The hearing before the panel of the Board of Commissioners was held, as stated by petitioner, on October 12, 1966, but Robert J. Devine was not under indictment at that time. The copy of the indictment filed by petitioner with the Supreme Court of Ohio shows on its face that it was returned by the Grand Jury of Lucas County, Ohio, during the January term, 1967, for a wholly unrelated matter, and filed with the Clerk of the Court of Common Pleas of Lucas County on March 22, 1967.

It is true that the bank statements and checks relating to petitioner's "trust account" were physically submitted to the Board of Commissioners after the conclusion of the oral hearing before the panel, but they were submitted by *both* parties (actually dispatched to the Board by petitioner) pursuant to a stipulation entered into by both parties *during* the hearing and *before* any decision was made by the board. (See excerpts from record before the panel, *infra,* A. pp. 9-11.) Moreover, both parties had the exhibits in hand during the preparation of their respective briefs to the Board of Commissioners for such comment therein as either party deemed advisable.

The supposition expressed by petitioner at page five of his petition—that the "finding of the state court that 'it appears that respondent [William J. Jacobs] deposited the

receivership funds in the trustee account he used for all his clients' apparently is based on the checks and bank statements"—is unfounded under the state of the record, for at the hearing before the panel petitioner orally testified that he deposited the receivership funds in his trustee account which he used for all his clients. (See excerpts from record before the panel, *infra*, A. pp. 9-11.)

REASONS FOR NOT GRANTING THE WRIT.

The petitioner states that he seeks a writ of certiorari under Rule 19, which authorizes a review "where a state court has decided a federal question of substance not theretofore determined by this court, or had decided it in a way probably not in accord with applicable decisions of this court." (Petition, pp. 1-2.)

Neither of these grounds is available to petitioner in the case at hand. The state court has not decided in this case a federal question of substance not heretofore determined by this Court. (See its opinion and orders set forth in Petitioner's Appendix A, B and C, pp. 11-16.) This Court has already decided the right of an attorney to the due process of law in disciplinary proceedings. See *Spevack v. Klein*, 385 U.S. 511, 87 S. Ct. 625 (1967), and *In re Ruffalo*, 390 U.S. 544, 88 S. Ct. 1222 (1968), cited by petitioner. See also *Bradley v. Fisher*, 13 Wall. 335 (1872). Cf. *Schware v. Board of Bar Examiners of State of New Mexico*, 353 U.S. 232, 77 S. Ct. 752 (1957), also cited by petitioner.

It is respondent's earnest contention that due process of law was accorded to petitioner and that this case was not decided by the state court contrary to any applicable decisions of this Court.

Petitioner had a full and fair hearing before the panel of the Board of Commissioners. He freely admitted his use

of the receivership funds for purposes other than those of the receivership; and this was the charge originally lodged against him by respondent.

The checks and bank statements he claims he had no opportunity to explain were *jointly* submitted to the Board of Commissioners by *both* petitioner and respondent pursuant to a stipulation made *before* the hearing was concluded by the panel. Unlike *In re Ruffalo,* 390 U.S. 544 (1968) no new charge was being made against petitioner during the hearing; the original charge of the misuse of trust funds was the subject matter of the complaint before the panel. Moreover, *petitioner made no objection to the submission of the bank documents to the board;* indeed, he stipulated to their submission.

After the hearing, respondent was obligated to submit a brief to the panel, then petitioner was obligated to respond thereto. Both parties, therefore, had the opportunity to comment upon the evidence, including the bank documents, if they so chose. Full opportunity was accorded petitioner to refuse to stipulate to the submission of the documents, or to object to their submission, or to comment upon them.

Petitioner also complains that he had no opportunity to present the testimony of his associate, Robert Devine. The affidavit of Robert Devine submitted by petitioner to the state court (see petitioner's Appendix D, pp. 22-24) marks him as a perjurer; but this fact is of less significance than the facts that Devine was cross-examined by petitioner at the hearing before the panel and that Devine's testimony did not materially contradict the testimony of petitioner himself. Devine testified to his own involvement in the handling of the receivership funds; in no way did his testimony affect petitioner's involvement and admitted handling of the funds.

It should also be noted that Devine's fear of an indictment and suspension from the practice of law (both of which subsequently came to pass) was not related in any way to his participation as the receiver in the matter at hand. On the contrary, the indictment pertained to another, wholly unrelated transaction, and the suspension from the practice of law was based on still another wholly unrelated transaction.

Petitioner also complains that he was deprived of a full and fair hearing because the Board of Commissioners found that he had violated Canon 6 in representing clients with conflicting interests even though respondent made no such charge. It is acknowledged by petitioner that the Supreme Court of Ohio expressly stated in its opinion that it did not consider this finding of the Board in reaching its decision (Petition, p. 9).

Petitioner then proceeds to impugn the integrity of the state court without any basis therefor in the record, while at the same time professing not to question "the bona fides of the state court" (Petition, p. 9). The analogy petitioner seeks to draw between this case and *Griffin v. California,* 380 U.S. 609, 85 S. Ct. 1229 (1965), is quite faulty. One of a court's functions is to determine what is material or not material in reaching a decision. The *Griffin* case does not purport to interfere with this judicial function.

As was stated by the Supreme Court of Ohio in its decision of July 10, 1968, in *State v. White,* 15 Ohio St. 2d 146, ___ N.E. 2d ___:

> "* * * We indulge in the usual presumption that in a bench trial in a criminal case the court considered only the relevant, material, and competent evidence in arriving at its judgment unless it affirmatively appears to the contrary. *People v. Smith,* 55 Ill. App. 2d 480, 204 N.E. 2d 577."

The last question presented by petitioner is that the penalty of indefinite suspension from the practice of law is harsh and unreasonable. Once misconduct has been found, the discipline to be imposed is a matter of judicial discretion. It is true that this discretion must be exercised within lawful limits, but there is no suggestion in the record that the state court unlawfully exercised its discretion in this case.

The rules of the Supreme Court of Ohio clearly set forth the procedures by which an attorney indefinitely suspended from the practice of law may seek reinstatement. Petitioner makes no claim that these procedures are unreasonable, and the suggestion by petitioner that no attorney indefinitely suspended has been reinstated in Ohio does not necessarily give rise to the inference that the procedures for reinstatement are unreasonable. It is equally inferable that those who may have sought reinstatement failed for one reason or another to establish their right to be reinstated.

The misuse of trust funds by an attorney is one of the most serious charges that can be lodged against him. The protection of the public and of funds left in the care of an attorney demands the most rigid adherence to the standards of proper conduct. An attorney does not furnish any bond to his clients to secure his faithful discharge of his duties with respect to trust funds. His only bond is his word. In such light it cannot seriously be urged that the misuse of trust funds by an attorney does not call for the judgment which the state court rendered in this case.

CONCLUSION.

It is earnestly maintained that petitioner has failed to show any grounds for the granting of a writ of certiorari and that his application therefor should be denied.

Respectfully submitted,

CHARLES E. IDE, JR.,
1010 National Bank Building,
Toledo, Ohio 43604,

and

JAMILLE G. JAMRA,
700 United Savings Building,
Toledo, Ohio 43604,
Attorneys for Respondent.

APPENDIX.

ANSWER OF WILLIAM JAMES JACOBS.

No. 110.

BEFORE THE BOARD OF COMMISSIONERS ON GRIEVANCES AND DISCIPLINE OF THE SUPREME COURT OF OHIO

In re: Complaint against WILLIAM J. JACOBS, *Respondent.*

THE TOLEDO BAR ASSOCIATION, *Relator.*

ANSWER.

Now comes respondent, William J. Jacobs, admits that while acting as attorney for Robert J. Devine, the receiver appointed by the Court of Common Pleas of Lucas County, Ohio, in cause number 194109, he did receive said sum of Eleven Thousand Five Hundred Dollars ($11,500.00) in trust; that he deposited said sum in a savings account number 6249 of Toledo Home Federal Savings Association and permitted said account to be used as collateral security for a passbook loan for another client, but subject to immediate recall and payment.

Respondent denies that said conduct constituted a willful violation of his oath of office or of the Canons of Ethics; respondent further states that a full and complete accounting was approved by the court on cause number 194109 without loss to any of the parties involved.

WILLIAM J. JACOBS,
CUBBON AND RICE,
By DAVID R. GOLDBERG,
Attorneys for Respondent.

(Certificate of Service Omitted.)

EXCERPTS FROM TRANSCRIPT OF HEARING BEFORE PANEL OF THE BOARD OF COMMISSIONERS ON GRIEVANCES AND DISCIPLINE OF THE SUPREME COURT OF OHIO.

October 12, 1966.

Testimony of Mr. William Jacobs upon cross-examination, page 44 of transcript:

"Mr. Jamra:

Q. What did you do with that $500.00 withdrawal?

Mr. Jacobs:

A. I put it in my trustee account where I had been paying the bills, that was owing me from the receivership.

Q. When you were making withdrawals from the first, was your trustee account constituted solely of funds left on deposit with you by clients?

A. Yes."

Stipulation regarding bank records, pages 221-226 of transcript:

[Frank W. Cubbon, Jr., Esq., whose name appears in the following excerpt, appeared as counsel for Mr. Jacobs before the hearing panel, and Rankin M. Gibson, Esq., who appears as counsel for petitioner in this court, joined Mr. Cubbon as counsel for Mr. Jacobs in all proceedings before the Supreme Court of Ohio. Mr. Summers, whose name also appears below, was a member of the hearing panel.]

"Chairman Dreidame: It is understood and agreed however, that counsel for the Respondent and counsel for the relator will procure from the Lucas County State Bank records of Mr. Jacobs' trust account for the months of December, 1963, through May of 1964, consisting of

the bank reconciliation statements by month, the copies of any deposit slips, and copies of cancelled checks.

Mr. Summers: May I have the further suggestion that the month of July be included in that, or unless there is some objection.

Chairman Dreidame: All right, then, amend it to include July, 1964, and that those photostatic copies may be delivered to the court reporter here, marked as Exhibit 11, and filed with these papers when the transcript is filed in the Supreme Court.

Any objection to that procedure for handling that particular point?

Mr. Cubbon: * * *

Chairman Dreidame: We will get you that information. But, does that handling of the stipulated Exhibit 11 satisfy and consistent with what is understood by counsel?

Mr. Cubbon: That is agreeable.

Mr. Jamra: Agreeable with the Relator.

Mr. Ide: Yes, agreeable.

Mr. Summers: Exhibit 11 then will be the bank records?

* * * * *

Chairman Dreidame: Then may the record show that *leave is given in the discretion and judgment of counsel for the respondent if he is able to procure and desires to procure and file photostatic copies of the bank reconciliation statement which was received by Mr. Jacobs from the Lucas County State Bank on his trust account for the month of June, 1964, and a photostatic copy of deposit slips, if available, and a photostatic copy of cancelled checks;* leave is given to do so within the next two weeks, and if so filed will be shown as Exhibit 12, and the fact of filing would be communicated to counsel

for the Relator so that they would have an opportunity to examine same before any filing of the document with the Supreme Court.*

Now, is there anything that counsel for either the Relator or the Respondent wanted to add to that statement into the record, either by way of modification or correction?

Mr. Jamra: Do I understand that counsel for the Relator will have an opportunity to examine both Exhibits 11 and 12 before they are submitted to the Supreme Court?

Chairman Dreidame: Yes, I understood that Exhibit 11 was going to be more or less jointly obtained by the effort, but I think the record should show that an opportunity is hereby given to counsel for the Relators to examine Exhibits 11 and 12 and to make any copies thereof that they want before the records are sent to Columbus.

Mr. Summers: I am not sure as related to the bank accounts, you mentioned the ledger sheets?

Chairman Dreidame: That is the bank reconciliation statements each month.

Mr. Cubbon: The balance sheet.

Chairman Dreidame: Which shows the charges and the credits.

Now, is there anything further by way of stipulation or by way of testimony that either side desires at this time to offer, proposes to offer in this record, or are we at a point where we may consider, subject to Exhibits 11 and 12 coming in, if they do, that we may consider that the evidence has been presented into the record. Is that correct counsel for the Relator?

---

* The items which would have constituted Exhibit 12 were in fact included in Exhibit 11.

Mr. Jamra: Yes.
Mr. Ide: Yes.
Chairman Dreidame: Correct, Mr. Cubbon?
Mr. Cubbon: Yes, sir." [Emphasis supplied.]

* * * * *